

No. 45596-0-II

Jefferson County Cause No. 11-2-00206-2

IN THE COURT OF APPEALS, DIVISION II
FOR THE STATE OF WASHINGTON

BRAD A. CLINEFELTER and **SUSAN CLINEFELTER**, husband and wife,

Appellants

v.

DENNIS SEVERSON, a single person, and **KENNETH D. UPHOFF** and

CHRISTINE S. BURNELL, husband and wife,

Respondents

APPELLANTS' BRIEF

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A. INTRODUCTION

This is a property dispute between neighbors living on Marrowstone Island, in Jefferson County, over a vacant platted street between the properties. Respondents claim ownership of the street by adverse possession; the Appellants deny adverse possession and seek enforcement of a Stipulation that recognized split ownership of the street, which Stipulation was agreed to in settlement of a prior lawsuit between the predecessors in interest of the same respective properties.

B. ASSIGNMENTS OF ERROR

Appellants Clinefelter assign error to:

1. Finding of Fact Number 8, as the fence in Swan street was not the common boundary between Thompson and Severson; and Severson did not exclusively occupy Swan Street.
2. Finding of Fact Number 9: Florence Hubbard was uncertain where the old fence was, and did not testify that she recognized the fence as the common boundary.
3. Finding of Fact Number 10: Florence Hubbard testified she did not apply to the County to open platted Swan Street.

4. Finding of Fact Number 13, in that Severson did not testify that the area was used exclusively by anyone; he also testified that he recognized it as a right of way.
5. Finding of Fact Number 14, in that utilities are in Swan Street and are maintained, and Clinefelters testified that they occasionally used Swan Street for taking walks.
6. Conclusion of Law Number 2, in that it was not necessary that the Stipulation be recorded to be binding on the parties and their successors in interest.
7. Conclusion of Law Number 3, in that the parties to the Stipulation, as well as the parties in the present action, as successors in interest, are bound by the Stipulation.
8. Conclusion of Law Number 6, in that Severson did not exercise exclusive ownership of Swan Street.
9. Conclusion of Law Number 7, in that there is insufficient evidence to show that the prior owners of the Uphoff/Burne^{hl} lots exercised open, notorious, actual and uninterrupted and exclusive adverse possession of the disputed area.
10. Conclusion of Law number 10, in that rather, the 1983 Stipulation in Jefferson County Superior Court #10880 should be enforced, and title to

the claimed disputed portion of Swan Street should not be awarded to Severson and to Uphoff/Burnell.

11. Conclusion of Law number 11.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Does a written Stipulation, signed by the parties who are adjoining landowners and filed in court in resolution of a lawsuit over title to a vacated street between them, wherein the parties recognize and accept each others' title ownership to half of the vacated street, bind their successors in interest?
2. May a party who signed a Stipulation which recognized title ownership to half a vacated street be allowed, in violation of the agreement, to claim that same half by adverse possession?
3. Can adverse possession be supported the acts of a neighbor who maintained the disputed area of vacated Swan Street as a non-exclusive right of way?
4. What is the level of proof required to show adverse possession of a vacated street which is used as an easement and right of way?

D. FACTS OF THE CASE

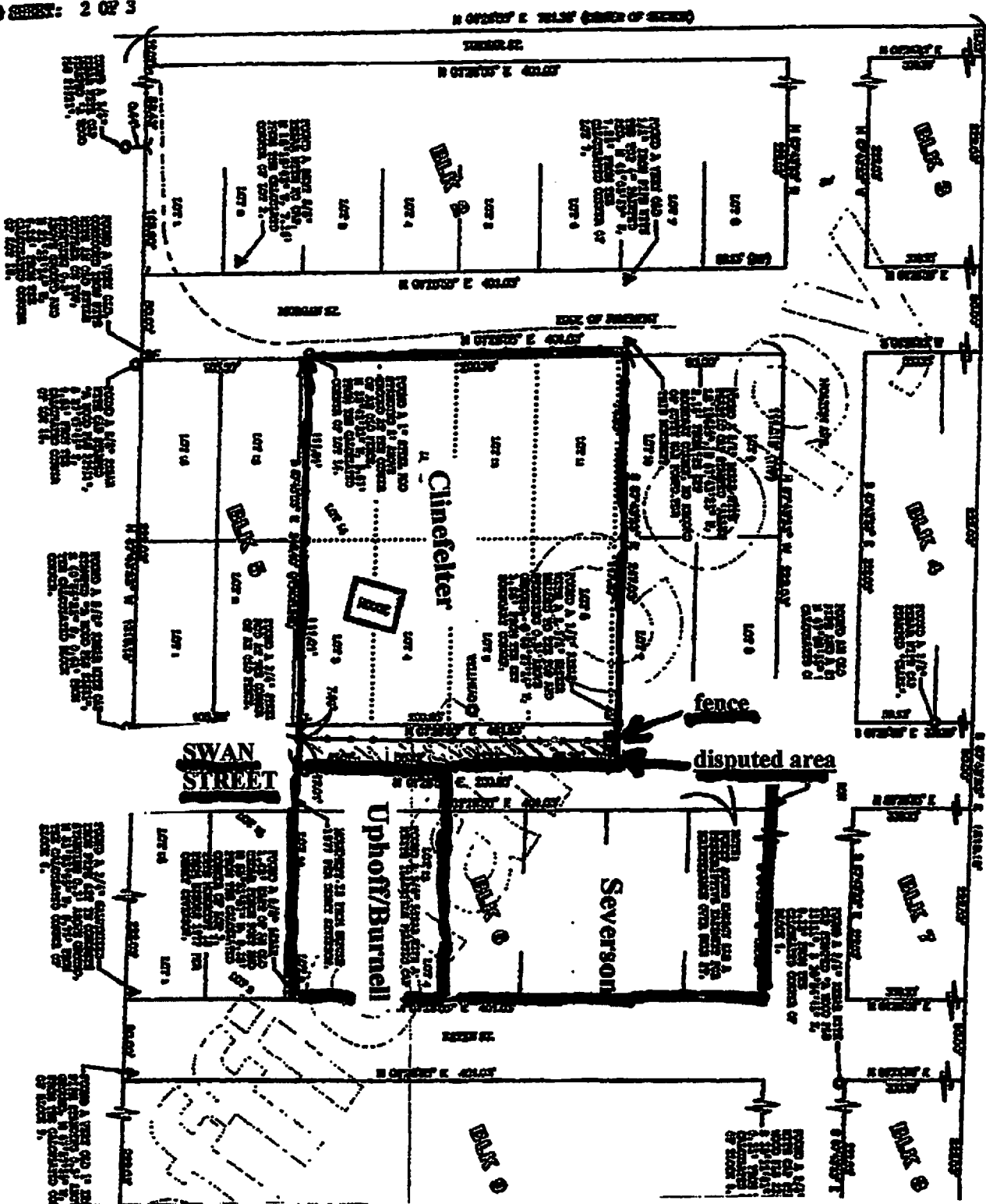
Appellants, Brad A. Clinefelter and Suzanne Clinefelter, husband and wife, (herein "Clinefelter") are the owners of Lots 3 through 6 inclusive, and Lots 11 through 14 inclusive, Block 5, Noltens' East Port Townsend

Addition, on Marrowstone Island, in Jefferson County, which lots they purchased from the estate of Pearl E. Thompson on March 20, 2000. (Verbatim Report of Proceedings [herein "RP"] II-24, 25; II-54); (Findings of Fact [herein "FOF"] 3)

Respondents, Kenneth D. Uphoff and Christine S. Burnell, husband and wife, (herein "Uphoff") are the owners of Lots 3, 4, 13 and 14 in Block 6 of Nolton's East Port Townsend Addition, which lots they purchased on December 30, 2003. (FOF 2; RP I-171)

Respondent Dennis Severson (herein "Severson") is the owner of Lots 5 through 12, Block 6 of Nolton's East Port Townsend Addition, which he purchased in 1977. The Severson lots lie contiguous on the North to the Uphoff lots. (FOF 1&2)

The disputed area is in Swan Street which lies between Appellants' and Respondents' lots. Swan Street was platted 50 feet wide (RP I-227) in Nolton's East Port Townsend Addition in 1889. (FOF 2) Swan Street borders the East side of the Clinefelter property and the West side of the Uphoff and Severson properties. (See diagram on the next page)



Swan Street has never been opened for public use. (FOF 4) However, Florence Hubbard (herein "Hubbard"), predecessor in interest to the Uphoff property, used Swan Street as the access to her property (RP I-25; I-73), as did subsequent owners (RP I-121,126); in fact Swan Street was kept open all the time. (RP I-126). Clinefelter's occasionally used Swan street to take walks. (RP II-46; II-52; II-82) Power poles and lines run down Swan Street that serve all parties hereto, and others, are maintained by the utility company. (RP I-202; II-47; II-55)

When Clinefelter's purchased their property from the Thompson estate, Clinefelter was unaware of the true location of the property boundaries. (RP II-36; II-54) On the East side of the property he found an old fence lying on the ground, covered with vegetation and debris; the cedar posts had rotted off. (RP—26; II-5; II-51). The north and south corners of the fence where held up by brush, as was one area by the large fir tree located in between lots 5&6. (RP II-27) He stood up and repaired this fence. (RP II-26) (FOF 15).

When Clinefelter's purchased their property in March of 2000, the disputed area between the Clinefelter and Uphoff properties was overgrown with weeds, little willow trees and tall grass. (RP II-28; II-30; II-8, 82) There

were no signs of upkeep. (RP-29; II-85-86) It remained like that until Uphoff moved in and started cleaning it up in 2004. (RP I-171).

Before Uphoff purchased the Uphoff property it was a mess. (RP I-29) The property had been trashed (RP I-174-5). When Uphoff purchased, the house was vacant, nobody was living in it. There was “no appliance or anything in the house at all” (RP I-172) It is unknown how long it had been vacant.(RP I-173)

Prior to this initiation this lawsuit, the Clinefelter’s and Uphoffs got along well as neighbors. (RP I-183; II-69) However, after Severson insisted a chicken coop be moved that Clinefelter had put up for Uphoff because Severson said it was in the right of way easement (RP I-199,200; RP II-36), both Clinefelter and Uphoff began to investigate their property boundaries. (RP I-199)

Uphoff began looking into the title history. The deed to Uphoff reads in part: “as per plat recorded in volume 2 of Plats, page 36, records of Jefferson County, Washington, together with that portion of vacated Swan Street which attaches by operation of law.” Uphoff discovered his predecessors in title had settled a law suit brought in Jefferson County Superior Court to quiet title to Swan Street by entering into a Stipulation (herein “Stipulation”). (RP I-199; I-203) He found that Raymond D. Thompson, Executor of the Estate of Ted Thompson, predecessor in title to

the Clinefelter property, had brought suit against Jefferson County and James & Florence Hubbard, husband & wife, predecessor in title to Uphoff property, in Jefferson County Superior Court on July 27, 1983, under cause # 10880, in a dispute over the use of, and title to, Swan Street. In the cause, answers were filed in court by all defendants and the matter was set for Summary Judgment when it was settled by the Stipulation of the parties. The Stipulation was signed by all the parties thereto, including the Prosecuting Attorney for Jefferson County. The Stipulation resolved the lawsuit. (RP I-122; I-138-140)

The Stipulation (a copy of which is attached as Exhibit A) provided (the portion in italics has been added):

“Comes now the parties to this action and herein set forth the following agreement by stipulation in settlement of all their respective rights and liabilities herein, to wit:

1. Plaintiff [*predecessor in interest of the Clinefelter lots*] is the owner of Lots 3, 4, 5 and 6 in Block 5 and Lots 15 and 16 in Block of Nolton’s East Port Townsend Addition, as per plat recorded in Volume 2 of Plats, page 46, Jefferson County, Washington.
2. Defendants [*predecessor in interest of the Uphoff lots*] are the owners of Lots 3, 4, 13 and 14 in Block 6 of Nolton’s East Port Townsend Addition as per plat recorded in Volume 2 of Plats, page 36, Jefferson County, Washington.
3. Separating the property of the parties is a street known as Swan Street, also part of Nolton’s East Port Townsend Addition. Swan Street was vacated by operation of law pursuant to Section 32, Chapter 19 of the Laws of 1891 at page 603.

4. As a result of the vacation of Swan Street both the plaintiff and defendants are owners of the one-half of Swan Street abutting their respective properties.
5. Both plaintiff and defendants each grant to the other a permanent easement for drainage, ingress, egress and utilities over, across and under that portion of Swan Street owned by each party.
6. Both parties agree that the roadway presently in existence on a portion of Swan Street shall remain in its present location but any future utilities shall be put in on the side of the roadway owned by the party obtaining the utilities and that any roads constructed in the future shall be constructed down the center line of Swan Street and an equal distance on each side of the center line.
7. The parties agree that neither shall use the other parties' half of vacated Swan Street or the open part of Swan Street for parking or storage or in any other manner not reasonably related to the exercise of the parties' rights to drainage, ingress, egress and utilities.
8. Plaintiff shall pay to defendants the sum of \$500.00
9. All other claims and counterclaims of the parties herein are dismissed with prejudice.
10. This agreement shall be binding upon the heirs, successors and assigns of the parties hereto."

Uphoff showed the Stipulation to Clinefelter and they discussed obtaining a survey. (RP II-37) Clinefelter hired Eric Olson, (herein "Olson"), a professional surveyor licensed in the State of Washington (RP I-203; II-88,89) to survey and mark the boundaries of the Clinefelter property and the centerline of Swan Street. (RP II-56) Olson placed survey markers to mark the boundaries of the Clinefelter property, including to the middle of Swan Street. Once completed, the survey was recorded in Jefferson County under Auditor's Number 561996, Volume 35, page 421 of Surveys on August 30,

2011. (A reduced copy of the survey setting forth the boundaries of the Clinefelter property is attached hereto as Exhibit B).

A meeting of all the neighbors was called to explain Olsen's findings. (RP I-33; RP I-198) Severson and Uphoff believed the Olson survey markers to be wrong (RP 1-39; I-58; I-204; I-221; II-2), and initiated this lawsuit (RP 1-38) on September 2, 2011, claiming adverse possession of the West half of Swan Street (CP 1-11); and in the alternative, for "...a judgment that Defendant Clinefelter is in violation of the "Stipulation" of July, 1983, as a binding contract on the parties to that agreement and their heirs, successors and assigns". (CP 6) Clinefelter's deny the claims of adverse possession, but join in the prayer that the Court enforce the Stipulation.

At trial Florence Hubbard (herein "Hubbard") testified that she was the sister-in-law of Severson (RP I-102), that she purchased what are now the Uphoff lots in 1977(RP-102). She bought the property from Ted Thomson (RP I-105). She married James Hubbard in 1982, and she and husband got into a dispute with Thompson over the use of Swan Street (RP I-113). She admitted she had signed the Stipulation on 27th July 1983. (RP I-115).

She wasn't sure the current fence in Swan Street was in the same location as it was when she lived there. (RP I-108; RP I-134). She testified that she had a small garden and a green house in Swan Street in the disputed area, and that when she moved off the property sometime around 1985 –

1986, that she took the green house with her. (RP I-120; I-134) She testified she sold the property to Kronquist (RP I-123) who let it become a 'garbage dump', and didn't keep up the small garden she had (RP I-120), nor the lawn or anything else (RP I-29; I-135; II- 169,170), and that during his ownership she didn't see anything in the disputed area (RP I-121). She testified that in 1992 there was no greenhouse or anything else in the disputed area. (RP I-125) After the green house was removed, there was nothing there (RP I-127), the garden was "let go, and that was the end of it" (RP I-127)

She said on direct that she never talked to Ted Thompson about the fence being the property boundary. (RP I-108) She denied attempting to get Swan Street opened or vacated. (RP I-122; I-128)

Severson testified he always recognized Swan Street as a right of way (RP I-25; I-96), and that no permanent structures were ever placed in Swan Street (RP I-97), that he wished to keep the easement open (RP I-39), and that he drives on it periodically (RP I-83). Severson had often given Clinefelter the impression that the fence was in violation of the easement. (RP II-32). Severson testified that the fence was in Swan Street. (RP I-25), and that he knew about the 1983 law suit. (RP I-30,31)

Severson testified that he kept the disputed area mowed and cleared up to within two feet of the fence.(RP I-26) He testified he left a large portion of the disputed area untouched – a semi-circle around a large fir tree

within general scope of the case made by the pleadings, and are in such form as may be required by the rule of the Court or statutory enactment.”

Superior Court Rule (CR) 2A¹, entitled “Stipulations”, recognizes the rights of parties to an action to resolve an action by stipulation. *Symth Worldwide Movers Inc. v. Whitney*, 6 Wn.App 176, 491 P.2d 1356 (1971). CR 2A provides that a written agreement or consent between parties or attorneys in respect to the proceedings in a cause will be recognized by the court. The rule allows that a signed, written agreement between parties to litigation will be upheld by the Court. In *Eddleman v. McGhan*, 45 Wn.2nd 430, 275 P.2d 729 (1954), the court stated that the purpose of this rule is to avoid disputes and to give finality and certainty to settlements and compromises if they are made. So stipulations are viewed with favor, and will be enforced if reasonable, not against any morals or sound public policy, within the general scope of the case made by the pleadings and in the form required. *Symth Worldwide Movers Inc. v. Whitney*, 6 Wn.App. 176, 491 P.2d 1356 (1971). Stipulations conforming to the rule are binding unless fraud, mistake, misunderstanding or lack of jurisdiction are

¹ Rule 2A. STIPULATIONS

No agreement or consent between parties or attorneys in respect to the proceedings in a cause, the purport of which is disputed, will be regarded by the court unless the same shall have been made and assented to in open court on the record, or entered in the minutes, or unless the evidence thereof shall be in writing and subscribed by the attorneys denying the Same.

involved. *DeLisle v. FMC Corp.*, 41 Wn.App 596, 705 P.2d 283 (1985).

Even oral stipulations made in open Court and entered in the Court Record are binding upon the parties and the Court. *Cook v. Vennigerholz*, 44 Wn.App. 612, 269 P.2d 24 (1954).

CR 2A supplements, but does not supplant, the common law of contracts. *In re Ferree*, 71 Wn.App 35, 856 P.2d 706 (1993). A stipulation of the parties is construed as a contract between them embodying the terms of thereof. *Washington Asphalt Co. v Harold Kaeser Co.*, 51 Wash. 2d 89, 91, 316 P. 2d 126, 69 A.L.R. 752 (1957); *Mayo v Mayo*, 75 Wash. 2d 36, 38, 448 P.2d 926 (1968).

Washington statutory law (RCW 2.44.010(1))² also recognizes stipulations as binding upon the parties provided that they are entered upon the minutes of the court, or signed by the party against whom the same is alleged and entered in the court record.

CR 2(a) and RCW 2.44.010 give certainty and finality to such settlements and compromises. *Howard v. Dimaggio*, 70 Wn.App. 734, 855

² § 2.44.010. Authority of attorney

An attorney and counselor has authority:

(1)

To bind his or her client in any of the proceedings in an action or special proceeding by his or her agreement duly made, or entered upon the minutes of the court; but the court shall disregard all agreements and stipulations in relation to the conduct of, or any of the proceedings in, an action or special proceeding unless such agreement or stipulation be made in open court, or in presence of the clerk, and entered in the minutes by him or her, or signed by the party against whom the same is alleged, or his or her attorney;

P.2d 335 (1993). Stipulations conforming to CR 2A and RCW 2.44.010 are binding unless fraud, mistake, misunderstanding or lack of jurisdiction are involved. *De Lisle v. FMC Corp.*, 41 Wn.App. 596, 705 P.2d 283 (1985). The function of the Trial Court is to implement the agreement, *Baird v. Baird*, 6 Wn.App 587, 494 P.2d 1387 (1972).

In *Snyder v. Tompkins*, 20 Wn. App. 167, 163, 579 P.2d 994, review denied, 91 Wash. 2d 1001 (1978), the court held that a stipulation in open court for disposal of real property was a legally enforceable conveyance of real property despite the provisions of the statute of frauds, RCW 64.04.020, requiring a writing with certain formal requisites to convey real property. In *In re Estate of Stockman*, 59 Wn. App. 711, 800 P.2d 1141, 1990 the court held that neither RCW 11.96.070, pertaining to judicial proceedings for determination of rights, nor RCW 11.96.130 (now repealed) pertaining to judgments and probate or trust proceedings, provide a means for by-passing this rule. A stipulation entered into open Court providing for the sale of property was held binding in *Cook v. Vennigerholz*, 44 Wn.2d 612, 269 P.2d 824 (1954) and in *Lasell v. Beck* 34 Wn.2d 211, 208 P.2d 139 (1949). In *Lasell*, the Court recognized that a proper stipulation would serve to vacate a default judgment. In the case of *Smyth v. Worldwide Movers Inc.* 6 Wn.App. 176, 491 P.2d 1356 (1971) the Court upheld a stipulation between the parties regarding the sale of

real property on foreclosure. In *In re Estate of Jaussaud*, 71 Wn.2d 87, 426 P.2d 602 (1967) the Court upheld a comprehensive stipulation which was dictated into the record in open court by the heirs and their attorneys. Subsequently an order approving the final accounting was entered. The court held the decree res judicata of all matters raised.

The 1983 Stipulation by the Hubbards and the Thompson estate should be determinative of the present action. The language of the stipulation is plain, and without need of judicial construction. *Shine v Nabob Silver Lead Co.* 163 Wash. 577. A stipulation properly arrived at is binding on the parties. *Cook v. Vennigerholz*, 44 Wn.2d 612, 269 P.2d 824 (1954). Only if fraud, mistake, misunderstanding or lack of jurisdiction is shown will a judgment by consent be reviewed on appeal. *Washington Asphalt Co. v. Harold Kaeser Co.*, 51 Wn.2d 89, 316 P.2d 126, 69 A.L.R.2d 752 (1957). *Baird v. Baird* | 494 P.2d 1387, 1389, 6 Wn. App. 587 .

The subject of the 1983 lawsuit settled by the Stipulation is identical to the subject of the current matter. As Christine Burnell stated in her deposition, and confirmed at trial, the dispute back in 1983 between the Hubbards, who lived in the Uphoff home, and the Thompsons, who lived where the Clinefelters now are, was a dispute over the same issue - ownership of Swan Street. (RP II-177)

The procedural posture of the lawsuit in which the 1983 Stipulation was entered in Jefferson County Superior Court, cause #10880, demonstrates that the parties intended the Stipulation to be the final resolution of the matter. Raymond D. Thompson, executor of the Estate of Ted Thompson, predecessor in interest of the Clinefelter property, brought suit against Jefferson County and James Hubbard & Florence Hubbard (formerly Grabinski), husband & wife, predecessor in interest of the Uphoff property, to Quiet Title to Swan Street and for a permanent injunction. Answers were filed by all defendants and the matter was set for Summary Judgment when it was settled by the Stipulation, which was signed by all parties and filed in open court. The written Stipulation, signed by all the parties and filed in court was a complete resolution of the matter.

b. THE DOCTRINE OF RES JUDICATA SHOULD APPLY TO THE STIPULATION

Under the doctrine of res judicata, a plaintiff is barred from litigating claims that either were, or should have been, litigated in a former action. *Schoeman v. New York Life*, 106 Wn.2d 855, 859, 762 P.2d 1 (1986) (*quoting Meder v. CME Corp.*, 7 Wn. App. 801, 804-805, 502 P.2d 1252 (1972), review denied, 81 Wn.2d 1011 (1973)). The purpose of this doctrine is to eliminate duplicitous litigation. Dismissal on the basis of re judicata is

appropriate in cases where the moving party proves a concurrence of identity between the two actions in four respects: (1) persons and parties; (2) cause of action; (3) subject matter; and (4) the quality of the persons for or against who the claim is made. Different defendants between suits are viewed as the same party as long as they are in privity. *Kuhlman v. Thomas*, 78 Wn. App 115, 897 P.2d 365 (1995) also see *Woodley v. Myers Capital Corp.*, 67 Wn. App 328, 337, 835 P.2d 239 (1992), review denied, 212 Wn.2d 1003 (1993).

Since the parties to this current litigation and appeal are successors in interest to the same real estate involved in the prior cause, there is privity; and the litigation is over the same subject matter, the same subject real estate. Privity exist between successors in interest in real estate ownership. As stated in *Sodak Distributing Co. v. Wayne*, 77 S. D. 496, 93 N. W. (2d) 791, 795 (1958): “Privity within the meaning of the doctrine of res judicata is privity as it exists in relation to the subject matter of the litigation, and specifically includes parties claiming under the same title. It denotes mutual or successive relationship to the same right or property. The binding effect of the adjudication flows from the fact that when the successor acquires an interest in the right it is then affected by the adjudication in the hands of the former owner.” *50 C.J.S. Judgments* Sec. 788; *30A Am. Jur., Judgments*, Sec. 399.

A judgment dismissing an action based upon a stipulation of the parties, settling and adjusting the subject matter of the action and agreeing to its dismissal, is a bar to subsequent action on the same cause. *Godfrey v. Dep't of Labor and Indus*, 198 Wash. 71, 86 P.2d 1110 (1939). The Court in *Godfrey* stated, "...this judgment is binding upon the original claimant and therefore upon its successor, the substitute respondent here. This rule is well settled that a judgment dismissing an action based upon a stipulation of the parties settling and adjusting the subject matter of an action and agreeing to a dismissal is a bar to subsequent action for the same cause." *Id.* at 76. Since the action in the prior matter was the same cause and same subject as is being prosecuted in the current cause by parties in privity, and the action was, on stipulation of the parties, settled and subsequently dismissed, it should not be allowed to be re-litigated.

It should be noted that the 1983 Stipulation recited that it was a "stipulation in settlement of all their [*the parties*] respective rights and liabilities...", and was made "...binding upon the heirs, successors and assigns of the parties...".

The Stipulation Agreement entered into by the Uphoff predecessors and Clinefelters predecessors, stipulated to and signed by those parties and filed in Court, is binding upon Clinefelter and Uphoff. The Court should enforce the Stipulation.

c. THE STIPULATION RECOGNIZES THAT EACH PARTY
HAS TITLE TO ONE HALF OF SWAN STREET

The Trial Court's Conclusion of Law number two recognized that the Stipulation was effective as a contract, but concluded that it "was not effective as a deed conveying an interest in real property in accordance with RCW 64.04.010". In its "Memorandum Opinion After Trial" the Trial Court wrote:

"The language in the Stipulation about "permanent easements" is of questionable value, since any conveyance of an interest in real estate must not only be in writing (RCW 64.04.010) and in the form of a "deed" (RCW 64.04.020), "but a conveyance of real property" must be recorded to be protected against subsequent purchasers and mortgages. RCW 65.08.070. A "conveyance" is defined very broadly, to include "every written instrument by which any estate of interest in real property is created, transferred, mortgaged or assigned or by which the title to any real property may be affected," etc. RCW 65.08.060."

However, as recognized in the Trial Court's Conclusion of Law number 5:

"Platted Swan Street was vacated by operation of law by the Laws of 1889-1890, Chapter 19, sec. 32 P.603 ("Non-user Statute"), and at all times relevant to this cause of action the fee to the land underlying the respective portions of the vacated street, which reverted to the adjacent owners to the centerline, has been in the private ownership of said adjacent owners."

The Trial Court recognized the established rule of the common law that an abutting landowner will be held to own the fee in the public way in

front of his or her property to the center of the street. McQuillin, *THE LAW OF MUNICIPAL CORPORATIONS*, § 30.32 (3rd Ed); *Rainier Ave. Corp v. City of Seattle*, 80 Wash.2d 362, 365, 494 P.2d 996 (1972) *cert. denied*, 409 U.S. 983; *Christian v. Purdy*, 60 Wash.App. 798, 801, 808 P.2d 164 (1991). *Finch v. Matthews*, 74 Wash.2d 161, 167, 443 P.2d 833, 838 (1968); *Puget Sound Alumni of Kappa Sigma, Inc., v. City of Seattle*, 70 Wash.2d 222, 422 P.2d 799 (1967).

The 1983 Stipulation recites:

1. As a result of the vacation of Swan Street both the plaintiff and defendants are owners of the one-half of Swan Street abutting their respective properties.

So the Stipulation is not a deed, nor is it a conveyance. The 1983 Stipulation did not create, transfer, mortgage, assign or change title to any real estate between the parties; instead it merely recognized what the parties already held legal title to. The Stipulation is the written agreement of the parties in recognition and contractual acceptance that each held legal title to their respective one-half of Swan Street.

d. THE STIPULATION RECOGNIZES THAT EACH PARTY HAS EASEMENT RIGHTS TO AND IN SWAN STREET

The Stipulation also is recognition between the parties that each abutting land owner has a permanent easement for drainage, ingress, egress

and utilities over, across and under that portion of Swan Street owned by the other party. The Stipulation recites:

1. Both plaintiff and defendants each grant to the other a permanent easement for drainage, ingress, egress and utilities over, across and under that portion of Swan Street owned by each party.

This also is merely recognition of what easement rights to and in Swan Street which each party already possessed. The possession of those rights was recognized in the Trial Court's COL 10.

None the less, the Trial Court reasoned that because the Stipulation "purported to grant an easement" it had to be recorded to be binding on third parties. But even though the Stipulation uses the word 'grant', neither party granted the other anything. They already held the easement rights. Therefore there was no need or requirement that the Stipulation be recorded. The Stipulation recognizes that the easement rights to Swan Street runs with the land. An easement appurtenant runs with the land. It passes by a deed of such person to his grantee and follows the land without any mention whatever. *Winsten v Prichard*, 23 Wn. App. 428, 431, 597 P.2d 415 (1979).

It is well-settled law in the State of Washington that the right of access to an abutting street is a property right that runs with the land. *McMoran v. State*, 55 Wash.2d 37, 40-41, 345 P.2d 598 (1959). The owner of property abutting upon a public street has a right to use the street for

ingress and egress. *Fry v. O'Leary*, 141 Wash. 465, 252 P. 111, 49 A.L.R. 1249 (1927). An "easement" is a property right separate from ownership that allows the use of another's land without compensation. *M.K.K.I., Inc. v. Krueger*, 135 Wash. App. 647, 145 P.3d 411 (2006).

The Stipulation is the written agreement between the parties of recognition that each held title to their respective one-half of Swan Street, and each had easement rights to the other's respective one-half. The remainder of the Stipulation is an agreement between the parties as to where any future road or utilities would be placed. There is nothing in the Stipulation that would affect title so as to require the Stipulation to be in the form of a deed and recorded with the county auditor.

2. UPHOFF AND SEVERSON'S ADVERSE POSSESSION CLAIMS FAIL

a. UHOFF CAN NOT USE HUBBARD'S POSSESSION AS TACKING FOR A CLAIM OF ADVERSE POSSESSION

Uphoff purchased their property on December 30, 2003; the Summons and Complaint in this matter was filed in court on September 21, 2011. Unable to meet the ten year requirement on the basis of their own possession, Uphoff sought to support a claim of adverse possession by tacking on the possession of prior owners.

b. ESTOPPEL BARS HUBBARD FROM CLAIMING
ADVERSE POSSESSION

The elements of equitable estoppel are: (1) an admission, statement or act inconsistent with a claim afterwards asserted, (2) action by another in reliance upon that act, statement or admission, and (3) injury to the relying party from allowing the first party to contradict or repudiate the prior act, statement or admission. *Group Health Coop. of Puget Sound, Inc. v. Department of Rev.*, 106 Wn.2d 391, 407, 722 P.2d 787 (1986); *Shafer v. State*, 83 Wn.2d 618, 623, 521 P.2d 736 (1974); *Pioneer Nat'l Title Ins. Co. v. State*, 39 Wn. App. 758, 760-61, 695 P.2d 996 (1985); *Department of Rev. v. Martin Air Conditioning & Fuel Co.*, 35 Wn. App. 678, 682-83, 668 P.2d 1286 (1983); *Conversions & Surveys, Inc. v. Department of Rev.*, 11 Wn. App. 127, 135, 521 P.2d 1203 (1974).

Collateral estoppel promotes the policy of ending disputes by preventing the re-litigation of an issue or determinative fact after the party stopped has had a full and fair opportunity to present a case. *In re Marriage of Mudgett*, 41 Wn. App. 337, 342, 704 P.2d 169 (1985); *Seattle-First Nat'l Bank v. Cannon*, 26 Wn. App. 922, 927, 615 P.2d 1316 (1980). In order for collateral estoppel to apply, the following questions must be answered in the affirmative: (1) Was the issue decided in the prior adjudication identical with the one presented in the action is question? (2) Was there a final

judgment on the merits? (3) Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication? (4) Will the application of the doctrine not work an injustice on the party against whom the doctrine is to be applied? *Rains v. State*, 100 Wn.2d 660, 665, 674 P.2d 165 (1983); *Lucas v. Velikanje*, 2 Wn. App. 888, 894, 471 P.2d 103 (1970).

The burden of proof is on the party asserting estoppel. *Alaska Marine Trucking v. Carnation Co.*, 30 Wn. App. 144, 633 P.2d 105 (1981), *cert. denied*, 456 U.S. 964 (1982). Collateral estoppel requires that the issue decided in the prior adjudication is identical with the one at hand. *Luisi Truck Lines, Inc. v. State Utils. & Transp. Comm'n*, 72 Wn.2d 887, 894, 435 P.2d 654 (1967) Privity denotes a mutual or successive relationship to the same right or property. *Owens v. Kuro*, 56 Wn.2d 564, 568, 354 P.2d 696 (1960).

Florence Hubbard admitted she signed the Stipulation. The Trial Court's Conclusion of Law number two recognized that the Stipulation was effective as a contract. The Stipulation is at odds with a claim of adverse possession. Hubbard cannot be heard to claim adverse possession in the face of the 1983 Stipulation in which she agreed in resolution of a quiet title lawsuit over title to the identical property that the Thompson estate was the owner of the property.

If Hubbard did use the disputed property after she Stipulated to the estate's ownership of the area, then the estate had the right to rely upon her

agreement recognizing the estate's ownership of the property. Hubbard should not be allowed to claim adverse possession in the face of the agreed stipulation resolving ownership and title to the disputed area. It works a double injustice if Hubbard is allowed to ignore the Stipulation, and be rewarded for doing so.

**c. NO PRIOR OWNER OF THE UPHOFF PROPERTY HAS
PROVEN ADVERSE POSSESSION**

Uphoff has not held possession of the disputed area for the required ten year period. Therefore Uphoff attempted to tack adverse possession by showing adverse possession by prior owners. However, no prior owner testified to adverse possession except for Hubbard. And Hubbard testified that when she moved off the property sometime around 1985 – 1986, and that she took the green house with her. (RP I-120; I-134) She testified she sold the property to Kronquist (RP I-123) who let it become a 'garbage dump', and didn't keep up the small garden she had (RP I-120), nor the lawn or anything else (RP I-29; I-135; II- 169,170), and that during his ownership she didn't find anything in the disputed area (RP I-121). She testified that in 1992 there was no greenhouse or anything else in the disputed area. (RP I-125) After the green house was removed, there was nothing there (RP I-127), the garden was "let go, and that was the end of it" (RP I-127)

When Clinefelter's purchased their property in March of 2000, the disputed area between the Clinefelter and Uphoff properties was overgrown with weeds, little willow trees and tall grass, and was trashy. (RP II-28; II-30; II-8, 82) There were no signs of upkeep. (RP-29; II-85-86) It remained like that until Uphoff moved in and started cleaning it up in 2004. (RP I-171). Before Uphoff purchased, the property it was a mess. (RP I-29) The property had been trashed (RP I-174-5). When Uphoff purchased the house was vacant, nobody had been living in it. There was "no appliance or anything in the house at all". (RP I-172) It is unknown how long it had been vacant.(RP I-173)

There is insufficient evidence to show adverse possession by prior owners.

d. THE EXCLUSIVE AND HOSTILE ELEMENTS OF
ADVERSE POSSESSION HAS NOT BEEN SHOWN BY
SEVERSON

In order to establish a claim of adverse possession, a party must show the possession was (1) open and notorious, (2) actual and uninterrupted, (3) exclusive, and (4) hostile for the statutory 10-year period. *Chaplin v. Sanders*, 100 Wash. 2d 853, 676 P.2d 431 (1984).

The hostility element requires that the claimant treat the land as his own as against the world throughout the statutory period. *Id.* at 860-61. The

only relevant consideration is the claimant's treatment of the land, not his subjective belief about his true interest in the land. *Riley v. Andres*, 107 Wash.App. 391, 397, 27 P.3d 618 (2001). The key to the Hostility prong of the adverse possession test is the treatment of the land. Severson's use of Swan Street is not inconsistent with the use of an easement area he already had a right to use. Severson did not "adversely possess" something he already had a right to use, i.e. Swan Street. *Burkhard v. Bowen*, 32 Wash. 2d 613, 203 P.2d 361 (1949). Severson already had an easement right over the breadth of Swan Street.

Severson's claim of adverse possession fails because his use of Swan Street was not hostile, nor exclusive. Severson built no permanent structures on the easement. He keeps it open as a right of way. He never claimed it to the exclusion of others.

Severson did not make a sufficient showing of adverse use to establish adverse possession of Swan Street. The mowing on some of the area and occasionally parking a small boat is not an inconsistent use of the easement area to sufficiently constitute adverse possession. *Edmonds v. Williams*, 54 Wn. App. 632, 636, 774 P.2d 1241 (1989).

F. CONCLUSION

The 1983 Stipulation is a binding contract between the parties to the contract and is binding on successors in interest, and should be enforced by

the Court; and it is a bar to repeat litigation of the identical matter by parties in privity.

Even if, for the purpose of argument, the Stipulation is not binding on the successive parties in interest, it is binding on Hubbard and estops her claim of adverse possession on behalf of Uphoff.

Insufficient evidence has been presented to show adverse possession by prior owners to Uphoff; and Severson has not shown exclusive and hostile possession of Swan Street. The Judgment of the Trial Court awarding title by adverse possession should be reversed.

Respectfully re-submitted this 23rd day of May, 2014.

A handwritten signature in black ink, appearing to read "Ted Knauss", is written over a horizontal line.

Ted Knauss
WSBA #9668
Peninsula Law Firm PLLC
203 A. West Patison St.
Port Hadlock, WA 98339
(360)379-8500
Attorney for Appellants

Exhibit A

NOTICE: IF THE DOCUMENT IN THIS FRAME IS LESS CLEAR THAN THIS NOTICE
IT IS DUE TO THE QUALITY OF THE DOCUMENT.

FILED

JUL 27 1973

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF JEFFERSON

RAYMOND D. THOMPSON, Executor of the
Estate of Ted Thompson, Deceased,

Plaintiffs,

vs.

JAMES HUBBARD and FLORENCE S. HUBBARD,
(formerly Grabinski), husband and wife,
et al.,

Defendants.

NO. 10880

STIPULATION

Come now the parties to this action and herein set forth the following
agreement by stipulation in settlement of all their respective rights and
liabilities herein, to wit:

1. Plaintiff is the owner of Lots 3, 4, 5 and 6 in Block 5 and
Lots 15 and 16 in Block of Nolton's East Port Townsend Addition, as per
plat recorded in Volume 2 of Plats, page 46, Jefferson County, Washington.

2. Defendants are the owners of Lots 3, 4, 13 and 14 in Block 6 of
Nolton's East Port Townsend Addition as per plat recorded in Volume 2
of Plats, page 36, Jefferson County, Washington.

3. Separating the property of the parties is a street known as
Swan Street, also part of Nolton's East Port Townsend Addition. Swan
Street was vacated by operation of law pursuant to Section 32, Chapter
19 of the Laws of 1891 at page 603.

4. As a result of the vacation of Swan Street both the plaintiff
and defendants are owners of the one-half of Swan Street abutting their
respective properties.

5. Both plaintiff and defendants each grant to the other a permanent
easement for drainage, ingress, egress and utilities over, across and
under that portion of Swan Street owned by each party.

///

STIPULATION

-1-

EXHIBIT

10

DEPONENT NAME:

D. Severson

DATE:

5/13/12

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6. Both parties agree that the roadway presently in existence on a portion of Swan Street shall remain in its present location but any future utilities shall be put in on the side of the roadway owned by the party obtaining the utilities and that any roads constructed in the future shall be constructed down the center line of Swan Street and an equal distance on each side of the center line.


7. The parties agree that neither shall use the other parties' half of vacated Swan Street or the open part of Swan Street for parking or storage or in any other manner not reasonably related to the exercise of the parties' rights to drainage, ingress, egress and utilities.


8. Plaintiff shall pay to defendants the sum of \$500.00


. All other claims and counterclaims of the parties herein are dismissed with prejudice.

10. This agreement shall be binding upon the heirs, successors and assigns of the parties hereto.

Dated this 27 day of July, 1983.


Raymond D. Thompson
Executor of the Estate of Ted Thompson
under Jefferson County Cause No.


James Hubbard


Florence S. Hubbard

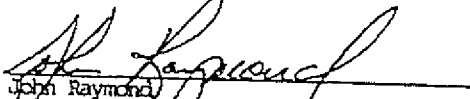
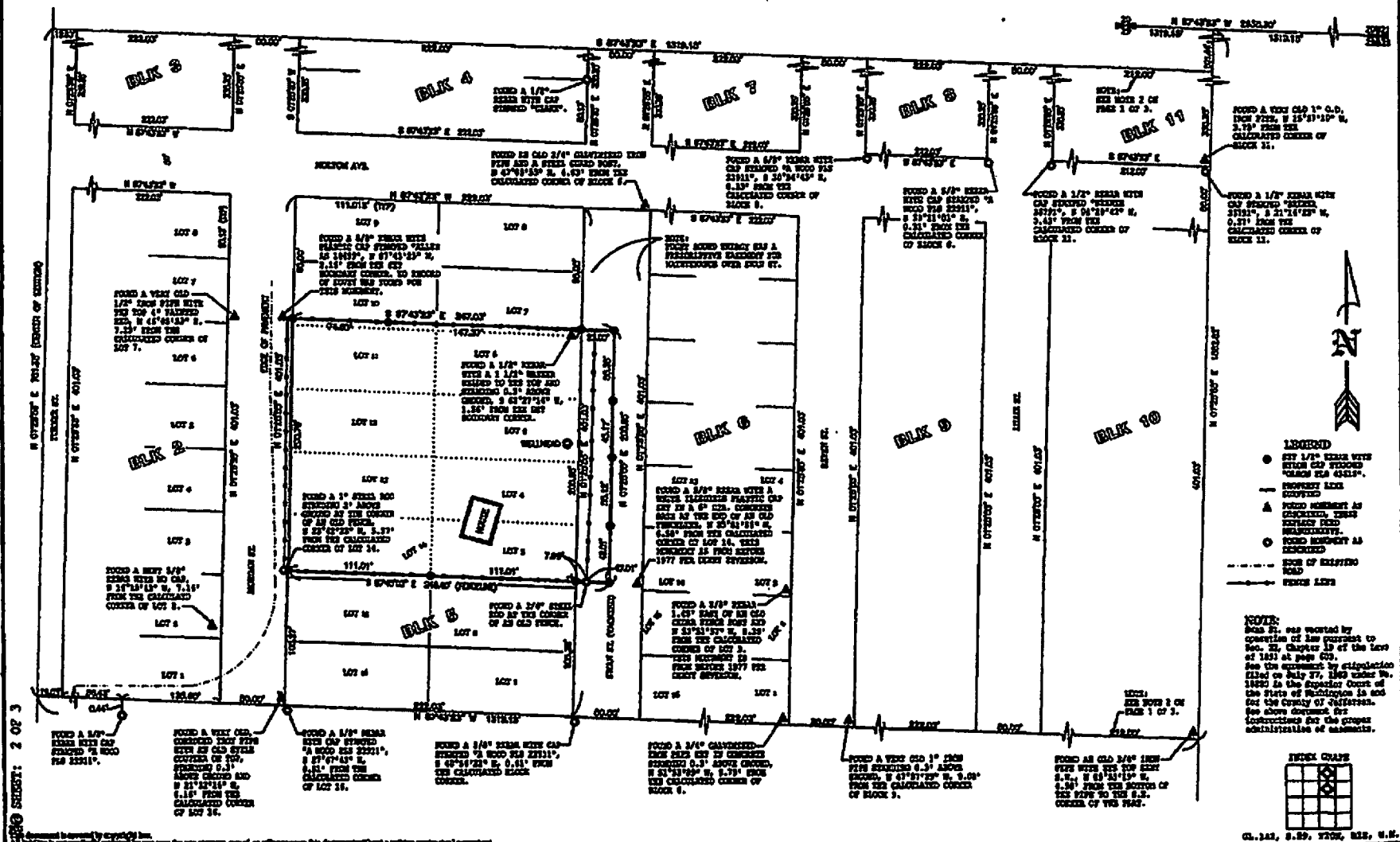

John Raymond
Prosecuting Attorney for Jefferson
County

Exhibit B

**A SURVEY OF A PORTION OF BLOCK 5, OF NOLTON'S EAST PORT TOWNSEND ADDITION,
SITUATED IN GOV'T LOTS 1 AND 2, SEC. 29, TWP. 30 N., R. 1 E., W.M., JEFFERSON
COUNTY, WASHINGTON**

THIS SURVEY WAS PERFORMED IN JEFFERSON COUNTY, WASHINGTON FOR: BRAD CLINEFELTER



Approved by: [Signature]

Surveyed by: [Signature]

Surveyed on: [Date]

Surveyed for: [Name]

Surveyed at: [Location]

Surveyed by: [Name]

Surveyed on: [Date]

Surveyed for: [Name]

Surveyed at: [Location]

Surveyed by: [Name]

Surveyed on: [Date]

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Surveyed on: [Date]

Surveyed for: [Name]

Surveyed at: [Location]

**Olson Professional
Surveying**

121 Garden Club Road Phone: (360) 301-1812
Northland, WA 98350

Job: 2011-0040 Surveyed ERG/DC DRAFTED: MRS

SURVEYOR'S CERTIFICATE

This map correctly represents a survey made by me or under my direction in accordance with the requirements of the Survey Recording Act, at the request of Brad Clinefelter in July of 2011.

Eric R. Olson 8-30-11

Eric R. Olson Certificate No. 43615



SCALE



AUDITOR'S CERTIFICATE

Filed for Record this 31 Day of August 2011 at 2:25p
in Book 35 of Surveys at Page 421 at the Request of Olson
Professional Surveying.

Barbara J. Duffield Deputy
COUNTY AUDITOR

5149910
A.M.

PENINSULA LAW FIRM PLLC

May 23, 2014 - 4:26 PM

Transmittal Letter

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Case Name: Clinefelter v. Severson

Court of Appeals Case Number: 45596-0

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Affidavit

Letter

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Petition for Review (PRV)

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